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No. 00-1195

IN THE

Supreme Court of the United States

KENNETH SUMMERVILLE,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether, under the facts of this case, issue preclusion bars Summerville from arguing about the job requirements for TWA's overtime, holiday and day-trading employment where a System Board of Adjustment has conclusively found that (1) lifting is a requirement of such employment for customer service agents and employees in charge, and (2) Summerville must be available to perform any function of these positions during such employment, a determination that was made within the System Board's exclusive statutory jurisdiction to decide disputes regarding the interpretation and application of the collective bargaining agreement pursuant to the Railway Labor Act, 45 U.S.C. § 184.

II. Whether, in light of the System Board's final and binding determination, judgment as a matter of law for TWA on Summerville's disability discrimination claim was proper because lifting is an essential function of Summerville's overtime, holiday and day-trading employment, and Summerville cannot perform an essential function of such employment with or without reasonable accommodation.

PARTIES

PETITIONER: Kenneth Summerville

RESPONDENT: Trans World Airlines, Inc.

Trans World Airlines, Inc. has no parent corporations or non-wholly owned subsidiaries. Sup. Ct. R. 29.6.

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STATUTORY PROVISIONS

Statutory provisions at issue, in addition to those provided by Summerville, include:

1. **45 U.S.C. § 151a: General Purposes.** The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

2. **45 U.S.C. § 184: System, group, or regional boards of adjustment.** The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, ... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the

disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Trans World Airlines, Inc. ("TWA") files this Brief in Opposition to the Petition for a Writ of Certiorari and would respectfully show as follows:

STATEMENT OF THE CASE

Kenneth Summerville was employed by TWA in 1969. (Petitioner's Appendix ("App.") 26.) He became an Employee in Charge ("EIC") at Lambert Field in St. Louis in 1989. (App. 26.) In that position, Summerville supervised and assisted Customer Service Agents ("CSA") who worked in the airport gate areas to coordinate boarding and deplaning of passengers, including those in wheelchairs, among other duties. For approximately nine (9) months in 1991-92, Summerville served in a management position as Manpower Coordinator, to which he was promoted by TWA; but after that job was eliminated, Summerville returned to his gate EIC position. (App. 26, 55-56.)

Summerville is a bargaining unit member of the International Association of Machinists & Aerospace Workers, AFL-CIO ("IAM"). (App. 26.) Summerville's employment, as a result, is subject to the TWA-IAM collective bargaining agreement ("CBA"), as well as TWA's Management Policy and Procedure Manual ("MPPM"). (App. 2, 26-27, 55.) The contractual duties of an EIC, as set out in the CBA, are: "assisting management where required in the leading, directing, and assigning of the work of Passenger Service Employees at the location; *the duties of the basic classification [CSA]; and such other duties as may be assigned.*" (App. 26-27.) (emphasis added). The contractual duties of a CSA, in pertinent part, are: "*checking-in passengers*

and baggage; insuring the expeditious flow of passengers through the terminal and gate areas; and performing passenger boarding functions." (App. 2, 59.) (emphasis added). Thus, by contract, the duties of an EIC include all CSA duties plus additional duties. (App. 38.)

In 1994, due to back injuries sustained in an automobile accident, Summerville was limited by his doctor to lifting no more than forty (40) pounds. (App. 2.) TWA accommodated Summerville by observing his lifting restrictions and assigning him to limited duty as a gate EIC. (App. 2.) Subsequently, TWA also accommodated Summerville by assigning him on his regular shift to a desk job as a Zone Coordinator EIC, which requires no lifting. (App. 2.) He chose not to use his seniority to bid into a different job classification that did not include lifting. (App. 60.)

The CBA further provides that "[e]mployees on limited duty assignment will not be eligible to work overtime during such assignments," and that "[e]mployees on limited duty assignment will observe all holidays." (App. 2, 54-55.) Finally, MPPM Section 10.71.01 provides employees working in a limited duty capacity are restricted from day trading. (App. 2, 55.) These provisions were agreed to by the IAM on behalf of its employee members.

Despite these applicable contract provisions, Summerville disagreed with TWA's action to restrict him from working overtime, holiday and day-trading shifts, so he brought a grievance under the CBA. (App. 2, 54.) Summerville argued that lifting was not a requirement of his position as an EIC either on his regular shift *or* on overtime, holiday and day-trading shifts (because he had sufficient seniority to avoid jobs that require

lifting) and, therefore, that he should be permitted to work such shifts. (App. 5, 38-39.) A TWA-IAM System Board of Adjustment ("System Board") was convened under the CBA and the Railway Labor Act ("RLA") to arbitrate Summerville's grievance. (App. 2, 10, 52-53.) The System Board's determination, pursuant to the CBA and the RLA, is final and binding on the parties. (App. 2, 4, 53-54.) Following the presentation of evidence and testimony by both parties and their witnesses on August 27, 1998, the System Board denied Summerville's grievance. (App. 53, 61.)

The System Board made several factual findings in rendering its decision. The Board determined that the CBA requires EIC's and CSA's to lift bags and wheelchair passengers in the course of performing the job, among other items, and that as a result Summerville could not "perform all of the functions of the Customer Service Agent position," as those duties and functions are set out in the CBA and in practice. (App. 3, 57-60). Specifically, the System Board's decision relied on and interpreted CBA Article 4(f) to include "lifting baggage and transferring passengers" as part of a CSA's duties, and it determined that such duties are "outside" of Summerville's restrictions while on overtime, holiday and day-trading shifts. (App. 59.) The System Board further determined that, on such shifts, Summerville would not necessarily be able to work as a Zone Coordinator (in which TWA has been able to accommodate him during his regular shift), but due to staffing limitations Summerville must be available to work as a CSA or EIC in *any* position with "additional or different duties." (App. 3, 58-59.)

Company and IAM witnesses testified at the Board's arbitration hearing that the purpose of the limited duty

policy was to ensure that TWA's operating requirements were met on overtime, holidays and day-trading shifts by requiring that unrestricted CSA's and EIC's are able to carry out the full responsibilities of that position with a smaller staff. (App. 58-59.) Indeed, Summerville agreed that he may be called on to perform *any* EIC or CSA position and function on overtime and holiday shifts.[1]

Summerville filed his Complaint against TWA in the District Court on December 6, 1996, and he filed his First Amended Complaint to add the IAM as a defendant on June 30, 1997. Summerville alleged that TWA and the IAM discriminated against him on the basis of his alleged disability, in violation of the Americans with

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[1] Summerville testified as follows:

Q: Do you understand that that's the rationale of the provisions negotiated by your union and the company that if you are going to show up on an overtime situation or on a holiday, that you could be assigned to any job at the airport within your job classification, customer service agent or EIC,you probably won't be just going to your zone coordinator desk; do you understand that?

A: Yes.

Q: Okay. And the overtime rosters for the CSA's and the EIC's, I think you've already testified to this, there is one overtime roster for all CSA's and all EIC's; am I right?

A: That's correct.

* * *

Q: Would you agree that a [CSA], whether large or small, is supposed to lift to the best of their ability, baggage at the ticket counter, assisting with bags at the gates, passengers, etc.?

A: I would agree that they would have to lift baggage or be able to lift baggage.

(TWA App. 3-4.)

Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (App. 21.) Prior to trial, the District Court held a hearing at which Summerville's motion in limine to exclude any reference at trial to the System Board arbitration was considered. (App. 9.) After extensive argument and briefing, the District Court found that while the System Board's factual findings were not dispositive of any issue in this case — including whether lifting was required of EICs and CSAs on overtime, holiday and day-trading shifts — the Court denied Summerville's motion in limine on the evidentiary issue. (App. 12-13.) The Court initially ruled that the Board's determination could be offered in evidence. (App. 13.) Subsequently, during trial, the District Court reversed course and granted Summerville's motion in limine to exclude any reference to the System Board's determination, which had not yet been introduced. (App. 14-20.)

At the close of Summerville's evidence, and again at the close of all evidence, TWA moved for judgment as a matter of law, which was denied. A verdict was rendered on November 3, 1998. (App. 22.) The jury found in favor of Summerville on his disability discrimination claim, awarding Summerville $175,000 in compensatory damages. (App. 22.)

On November 18, 1998, TWA renewed its motion for judgment as a matter of law or, in the alternative, for new trial or remittitur. (App. 22.) Summerville also filed his motion for equitable and injunctive relief on that date. (App. 43.) The District Court denied TWA's motions on June 11, 1999 and, on June 17, 1999, the District Court granted Summerville's motion for equitable and injunctive relief, awarding Summerville $39,081.06 in back pay, plus post-judgment interest,

and enjoining TWA from prohibiting Summerville from the same opportunity to work overtime and holiday hours and to day trade as given to other employees. (App. 40, 42, 49-50.)

On August 7, 2000, following oral argument, the United States Court of Appeals for the Eighth Circuit reversed the District Court's order denying TWA's motion for judgment as a matter of law on Summerville's ADA claim, finding that issue preclusion barred Summerville from contesting the System Board's factual findings on his job requirements. (App. 1-7.) The Eighth Circuit then entered judgment as a matter of law for TWA on Summerville's disability discrimination claim because the Court found he could not perform the essential functions of his job on overtime, holiday and day-trading shifts with or without accommodation. (App. 1-7.) Summerville's petition for rehearing and rehearing *en banc* was denied on October 26, 2000. (App. 51.)

REASONS FOR DENYING THE WRIT

A. Introduction

The Eighth Circuit Court of Appeals did not err when it granted judgment as a matter of law for TWA on Summerville's disability discrimination claim. Moreover, this is not a decision that is worthy of review by the Supreme Court. *See* Sup. Ct. R. 10(c). This is an intensively fact-driven decision which, due to the unusual nature of the facts and the claims at issue, does not have broad applicability. Moreover, contrary to Summerville's contention, this is not a case about complete preemption of ADA or other civil rights claims by the RLA. There is no conflict between this decision by a unanimous Eighth Circuit Court of Appeals panel,

which was upheld on a petition for rehearing and rehearing *en banc*, and the decisions of any other circuits. See Sup. Ct. R. 10(a). Finding in favor of TWA as a matter of law is entirely consistent with the language and purposes of the RLA, the ADA, and with established precedent. Respondent TWA respectfully requests the Court to deny Summerville's Petition for Writ of Certiorari.

The Eighth Circuit held that the System Board's final and binding factual determinations on a discrete issue precluded Summerville from arguing about his job requirements for overtime, holiday and day-trading shifts. Under the RLA, the factual findings made by the Board to resolve Summerville's grievance were within its exclusive statutory jurisdiction. Because the System Board determined that the functions of a CSA and an EIC necessarily include "lifting baggage and transferring passengers," and that Summerville must be able to perform those functions on overtime, holidays and day-trading, the courts must defer to these findings. On these facts, the System Board's findings are determinative of a material element that Summerville must prove to be successful on his disability discrimination claim under the ADA. Accordingly, the Eighth Circuit properly held that issue preclusion applies to bar Summerville's arguments to the contrary.

Moreover, TWA was entitled to judgment as a matter of law on Summerville's disability discrimination claim because Summerville cannot thereby perform an essential function of his job on overtime, holiday, or day-trading shifts, with or without reasonable accommodation. Lifting is an essential function of the EIC and CSA positions on those shifts. Further, as the System Board found and Summerville conceded, EIC's working over-

time, holiday and day-trading shifts may be assigned to any position or function, without regard to seniority. Because lifting is required on those shifts, and Summerville cannot perform essential functions of his job even with accommodation, judgment as a matter of law was appropriate. The Petition for Writ of Certiorari should be denied.

B. Issue Preclusion Bars Summerville's ADA Claim On These Facts

Based on the unique facts of this case, issue preclusion bars Summerville from challenging certain facts determined by the System Board in support of his burden to prove a material element of his ADA claim. The System Board has exclusive jurisdiction under the RLA to make the factual determinations that Summerville asked the District Court to ignore. *See* 45 U.S.C. § 184; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994); *Brotherhood of Railway Carmen of the U.S. and Canada v. Missouri Pac. R.R. Co.*, 944 F.2d 1422, 1426 (8th Cir. 1991). The Eighth Circuit Court of Appeals properly held that the District Court erred when it refused to apply the doctrine of issue preclusion on the factual issues of whether Summerville is required to lift on overtime, holiday and day-trading shifts and that he must be available to work as a CSA or EIC at any position on such shifts, which was conclusively determined by the System Board. Accordingly, judgment as a matter of law was appropriate.

1. Contractual Disputes Under The RLA

Congress enacted the RLA "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working

conditions." 45 U.S.C. § 151a. To that end, Congress directed carriers to establish System Boards of Adjustment, granting them exclusive jurisdiction to hear and determine all matters that are "minor" disputes — disputes between an employee and a carrier growing out of grievances, or out of the interpretation or application of collective bargaining agreements. 45 U.S.C. § 184; *Hawaiian Airlines, Inc.*, 512 U.S. at 252-53; *Brotherhood of Railway Carmen*, 944 F.2d at 1426; *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993). Minor disputes are to be resolved solely by the airline's System Board to the exclusion of the federal courts. *Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992), *cert. denied*, 507 U.S. 992 (1993).

Here, it is without question that Summerville's grievance regarding whether he should be allowed the opportunity to work overtime and holidays and to day trade was a "minor" dispute, and that it required both interpretation and application of the CBA and all the facts and circumstances involved. The grievance was therefore within the *exclusive* jurisdiction of the System Board, which is uniquely qualified to evaluate fact disputes within the context of the CBA, industry practice and the common law of the shop. *See Blakely v. USAirways, Inc.*, 23 F.Supp.2d 560, 566 (W.D.Pa 1998). Moreover, the System Board's findings are final and binding. *International Assoc. of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 694 (1963) (Congress intended Board to act as public agency and for its awards to have legal effect). (App. 2, 4, 53-54.)

2. The System Board's Conclusive Determination

When Summerville was restricted by his doctor from lifting following his accident, TWA placed Summerville on limited duty to accommodate him on his regular shift as a gate EIC. Subsequently, Summerville was given the Zone Coordinator EIC position, which does not require any lifting. In other words, TWA placed Summerville in a full-time position in which he does not have to lift. He chose not to bid into a another job that did not require lifting. The CBA, however, provides that employees on limited duty may not work overtime or holiday shifts, or day-trade, because these shifts are staffed with far fewer employees and require that employees may be assigned to work *any* CSA or EIC position, including the ticket counter, the duties of which Summerville *admits* require lifting.

After TWA accommodated Summerville, he grieved TWA's decision that he could not work overtime and holiday shifts or day trade as an EIC or CSA. After hearing all of the evidence and the parties' witnesses, the System Board denied Summerville's grievance. The Board found that Summerville could not "perform all of the functions of the [CSA]," as those functions are set out in the CBA and in practice. Specifically, the System Board's decision relies on and interprets Article 4(f) to include "lifting baggage and transferring passengers" in a CSA's duties, and it determined that such duties were outside of Summerville's lifting restriction. The System Board further determined that, even as an EIC, Summerville must be able to perform all of the functions of a CSA on overtime, holiday and day-trading shifts.

3. The System Board Findings' Effect on Summerville's ADA Claim

Summerville contends that TWA violated the ADA when it followed the terms of the CBA, not allowing him to work overtime and holidays or to day trade while on limited duty. Despite the System Board's findings, as well as his own admissions, Summerville argued both before the Board and at trial that lifting was not required on overtime and holidays, and while day-trading, and that he did not have to be available to perform CSA functions on those shifts; thus, Summerville alleged, TWA discriminated against him by refusing to allow him to work those shifts. Summerville continues to mislead here by relying solely on the limited duties he performs on his regular shift as a Zone Coordinator EIC, in which he has been accommodated by TWA so as not to include lifting, and ignoring the findings made by the System Board, pursuant to the grievance process he requested.

Because the System Board conclusively determined that the functions of a CSA and EIC during overtime, holiday and day-trading shifts involve "lifting baggage and transferring passengers," and that Summerville must be available to perform any CSA function on such shifts, he is barred from arguing to the contrary and the District Court is without jurisdiction under the RLA to make its own fact determination, or to allow the jury to do so. On these facts, it was contrary to the RLA statutory scheme created by Congress for the jury to make its own determination of job functions on such shifts based on Summerville's proffered "evidence." Indeed, the District Court's ruling, which was properly reversed by the Eighth Circuit, undermined the exclu-

sive jurisdiction of the System Board. *See Hawaiian Airlines*, 512 U.S. at 253 (citing 45 U.S.C. § 184.)

After interpreting the contract as well as all facts and circumstances at issue, the System Board applied its interpretation to the question before it, finding that Summerville could not "perform all of the functions of the CSA position" on overtime, holiday and day-trading shifts. Summerville's proof at trial, which was permitted by the District Court despite the System Board's determination to the contrary, consisted of an effort to show that he was *not* required to lift and that his lifting restriction did *not* prevent him from performing the essential functions of his position and, thus, that he should be permitted to work overtime and holidays and to day trade. After hearing the evidence, the System Board found within its exclusive jurisdiction that Summerville was wrong. Those findings were binding on Summerville.

The Eight Circuit correctly applied the doctrine of issue preclusion in this matter. (App. 4.) The Court of Appeals found that:

> the traditional elements of issue preclusion are present because these fact issues are identical in both the System Board case and the present case; these fact issues were actually litigated before the System Board; resolution of these fact issues was necessary and essential to the judgment of the System Board; and the System Board's decision was a final, valid judgment.

(App. 4.) (citing *Haley v. Retsinas*, 138 F.3d 1245, 1248 (8th Cir. 1998)); *see also Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir. 1997); *Benjamin v. Traffic Exec. Assoc. Eastern Railroads*, 869 F.2d 107, 110 (2nd

Cir. 1989). Thus, because of the System Board's conclusive factual findings, the Court of Appeals held Summerville was barred by issue preclusion from arguing about the job requirements for his overtime, holiday and day-trading employment. *See, e.g., Alexander v. Pathfinder, Inc.*, 91 F.3d 59, 62-63 (8th Cir. 1996) (hearing officer's *fact finding* determination barred plaintiff's ADA and Rehabilitation Act claims), *on remand*, 1999 WL 673226 (August 31, 1999).

This is not to say that the RLA broadly preempts all ADA claims as a matter of law. The law of this Court is that it does not, and TWA has never suggested here that the RLA precludes Summerville from asserting an ADA claim.[2] Rather, TWA asserts that, on these unique facts, issue preclusion applies to bar Summerville from arguing contrary to the determination of the System Board, which was made within its exclusive jurisdiction at his request. Thus, as to the specific issues of fact whether Summerville is required to lift on overtime, holiday and day-trading shifts, and whether he must be available to perform any job function on such shifts, issue preclusion bars Summerville in this action from revisiting the prior determination. The remaining question, addressed below, is how that determination ultimately effects Summerville's ADA claim.

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[2] The District Court failed to address TWA's argument of issue preclusion in its Order denying JAML. Throughout trial, the District Court seemingly confused TWA's contention that issue preclusion applied to the specific factual issue whether lifting was required on the special shifts Summerville wanted to work, with complete preemption of Summerville's ADA claim as a matter of law, which TWA never argued. Similarly, the District Court granted plaintiff equitable relief after summarily dismissing TWA's arguments that the System Board's decision was preclusive on the fact issue that lifting was required on certain shifts.

Summerville erroneously contends that this Court's decision in *McDonald v. City of West Branch*, 466 U.S. 284 (1984), is controlling on the question whether issue preclusion bars Summerville's ADA claim. Summerville's argument misses the mark. He claims *McDonald* provides that an arbitration award may never have collateral estoppel effect on a discrete issue in a civil rights action. Despite Summerville's meritless argument that *McDonald* is both factually and legally "virtually identical" to his own dispute, *McDonald* is clearly distinguishable.

The concerns expressed by the Court in *McDonald* over the alleged infirmities of arbitral fact finding, on to which Summerville grasps in his Petition, have been recently repudiated by this Court.[3] *See Circuit City Stores, Inc. v. Adams*, — U.S. —, 2001 WL 273205 at *15-16 (March 21, 2001) (*citing Gilmer v. Interstate/*

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[3] Summerville contends that this Court, in *McDonald* and *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), among other cases, has taken the position that "arbitral fact finding is generally not equivalent to judicial fact finding," and that arbitration is patently unreliable to resolve disputes in civil rights actions. (Pet. Brief at 14-17.) However, Summerville severely mischaracterizes the current state of the law. *See Circuit City Stores, Inc. v. Adams*, — U.S. —, 2001 WL 273205 (March 21, 2001). Such reasoning embodies what this Court has termed "the old judicial hostility to arbitration," *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989), which the Supreme Court has overwhelmingly repudiated. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court eschewed the view expressed in those earlier cases that "arbitration was inferior to the judicial process for resolving statutory claims, noting that 'mistrust of the arbitral process ... has been undermined by our recent arbitration decisions.'" *Id.* at 34 n.5. Indeed, in *Gilmer*, this Court expressly upheld a contractual agreement to arbitrate as the exclusive remedy for the employee's ADEA claim.

Johnson Lane Corp., 500 U.S. 20, 30-32 (1991)). Further, *McDonald* did not concern a System Board arbitration pursuant to the strict statutory framework of dispute resolution established by the RLA. Finally, in *McDonald*, this Court considered whether a prior non-RLA arbitration award had a *res judicata* or complete preclusive effect on the Petitioner's Section 1983 action; not whether specific factual findings of a System Board, acting within its exclusive statutory jurisdiction under the RLA, were dispositive of an ADA claim in that particular case because the same operative facts were required to be proven as a material element of the claim. *See McDonald*, 466 U.S. at 287 n.5 (Court used term "collateral estoppel" for "convenience" to be consistent with opinion below, but distinguished meaning from that of "res judicata," which was applicable therein). Thus, this Court's decision in *McDonald* is distinguishable on the facts of Summerville's case.

As this Court noted in *McDonald*, issue preclusion is distinct from res judicata or complete preemption. *See id.* Based on the System Board determination, there can be no factual dispute as to whether the required duties of a CSA or EIC include lifting baggage and transporting passengers on overtime, holiday, and day-trading shifts. Nor can there be any factual dispute as to whether Summerville could perform the duties of a CSA or EIC on overtime, holidays and day-trading. These issues have been determined by Summerville's own invocation of the System Board process. The System Board interpreted the terms of the CBA and the facts and circumstances involved, and it made a conclu-

sive determination to which both Summerville, as a member of the IAM, and TWA, are bound under the RLA.[4]

Thus, because resolution of these factual issues was dispositive of Summerville's disability discrimination claim, there was no question of fact remaining for the jury. The Court should have concluded as a matter of law, based on the System Board determination, that Summerville was precluded from arguing that lifting was not an essential function of an EIC or CSA on overtime, holidays, and day-trading shifts. The Court is not permitted to make its own determination as to what the contractual functions and duties of a CSA are on such shifts. The Court likewise is without jurisdiction to permanently enjoin TWA to disregard the binding

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[4] Summerville contends that the only issue before the jury was whether TWA had discriminated against him under the ADA, and that this particular issue was not ever before the System Board. While the Board was not asked to specifically decide "discrimination," the same fact question – whether lifting is required of a CSA or EIC on overtime, holidays and while day trading – was presented to both forums. Indeed, Summerville agrees that the "main" issue in his ADA claim was for him to prove that lifting was not required on such shifts, or his claim would fail. The System Board was asked for its interpretation and application on that fact issue before trial, a role it must play exclusively under the RLA. Despite this long-standing precedent, Summerville argues that the System Board "overstepped its bounds" when it denied his grievance. (Pet. Brief at 9.) Once the Board completed its statutory duty, Summerville was bound by that determination, as was TWA. He cannot argue to the contrary in the District Court or pretend that the Board's opinion means nothing. (App. 3.)

Moreover, Summerville could have sought review of the System Board determination by moving to vacate in the District Court, but he chose not to do so. (*See* 45 U.S.C. § 153 First (q).) Indeed, Summerville sought no review at all, and now he wants to pretend that the Board made no findings.

determination of the System Board by taking contrary action. Indeed, to do so violates the RLA and creates a situation where Summerville is the only IAM-represented employee "exempted" from the requirements of the CBA. Issue preclusion binds Summerville under these facts, as the Eighth Circuit properly held.

C. Lifting is an Essential Function of Summerville's Job on Overtime, Holiday and Day-Trading Shifts

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). To prove disability discrimination in violation of the ADA, Summerville bears the burden to show that he can perform the essential functions of the employment he seeks. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995). Summerville could not meet his burden of proof and, thus, TWA was entitled to judgment as a matter of law.

There is no dispute that Summerville can perform the essential functions of his job as Zone Coordinator EIC on his regular shift, as he has been accommodated to do so by TWA. That is not the issue here. In this lawsuit, Summerville seeks to work overtime and holiday shifts, and to day-trade, as an EIC, when job requirements are different. Thus, what Summerville may or may not have to do on his regular shift is not relevant to a discussion of essential functions here. On overtime, holiday and day-trading shifts, when staffing levels are reduced, the CBA imposes different standards. Accordingly, all IAM represented employees are prohibited from working overtime and holidays and from day trading while on limited duty.

The ADA defines "essential functions" to encompass those "*fundamental*" duties required by the position in question, excluding "marginal" functions. 29 C.F.R. § 1630.2(n)(1). Moreover, the employer has the right to determine those fundamental duties. *See Nesser v. TWA*, 160 F.3d 442, 445-46 (8th Cir. 1998) (*citing* 42 U.S.C. § 12111(8).) The Eighth Circuit has recognized that much of the information used to determine essential functions "lies uniquely with the employer" under the ADA and its regulations. *See Benson*, 62 F.3d at 1113.

The ADA regulations provide that "[a] job function may be considered essential for *any* of several reasons, including but not limited to the following: ... (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed." 29 C.F.R. § 1630.2(n)(2)(ii). Further, the regulations provide that: e*vidence* of whether a particular function is essential *includes*, but is not limited to: *(i) the employer's judgment* as to which functions are essential; (ii) "written *job descriptions*"; (iii) the amount of time spent on the job performing the function; (iv) the "consequences of not requiring the incumbent to perform the function"; (v) the "*terms of a collective bargaining agreement*"; and (vi) "work experience" of employees in similar jobs. *See* 29 C.F.R. § 1630.2(n)(3) (emphases added).

Contrary to Summerville's contentions, the Eighth Circuit did not "ignore" these factors, or base its decision on TWA's "views" alone. (*See* Pet. Brief at 13.) Rather, the Court of Appeals reviewed the District Court's decision "on the essential function issue de novo," in light of the applicable ADA regulations and the facts, and in accordance with the appropriate standard of

review.[5] The Court agreed with TWA after such consideration, finding as a matter of law that lifting is an essential function of any CSA or EIC position on overtime, holiday and day-trading shifts. (App. 5-6.).

Lifting is an essential function of Summerville's job on such shifts according to the CBA, the written job description, and the employer's judgment, which is given deference under the ADA and, moreover, is in accordance with the System Board's findings. *See Nesser*, 160 F.3d at 445-46; *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). The CSA and EIC positions specifically require employees to perform "checking-in passengers and baggage; insuring the expeditious flow of passengers through the terminal and gate areas; and performing passenger boarding functions." Additionally, the consequences of not requiring employees to lift on such shifts in light of staffing limitations would greatly impair the airline's ability to operate.[6] Accordingly, based on its consideration of

[5] Contrary to Summerville's assertion, the standard of review used by the Eighth Circuit Court of Appeals below, citing *Douglas County Bank & Trust Co. v. United Fin. Inc.*, 207 F.3d 473, 477 (8th Cir. 2000), (*see* App. 5), was in accordance with the standard of review on a motion for judgment as a matter of law enunciated by this Court in *Reeves v. Sanderson Plumbing Prod., Inc.*, 147 L.Ed.2d 105, 122-23 (2000).

[6] Indeed, Summerville's forty (40) pound lifting restriction would preclude him from handling most baggage that is checked should he be assigned to the ticket counter while on overtime, holiday and day-trading shifts. Even one seventy (70) pound bag sitting at the ticket counter or a wheelchair bound passenger at the gate who cannot be boarded due to an employee's inability to lift may delay an entire flight. Like the desk police officer in *Champ v. Baltimore County*, 884 F.Supp. 991 (D.Md. 1995), who could not fire a gun but had to be able to do so when necessary as a police officer, there can be no question that lifting is an essential function of a CSA/EIC's job on such shifts, when staffing levels are reduced. (App. 6.)

these factors and following its prior decision in *Moritz*, the Eighth Circuit held as a matter of law that lifting is an essential function of Summerville's overtime, holiday and day-trading employment.[7] (App. 6.)

The only remaining issue for the Court of Appeals concerned whether Summerville demonstrated that he could perform the essential functions of the EIC or CSA position on overtime, holidays, and day-trading shifts with or without reasonable accommodation, regardless whether he can perform such functions on his regular shift. The Court found, however, that Summerville could be assigned on those shifts to any CSA or EIC position (App. 6), which may include the ticket counter (where lifting is required without question). Moreover, in accordance with the System Board's findings, Summerville admitted that he is not assured the Zone Coordinator position on those shifts, and he further acknowledged that he cannot perform all of the essential functions of the EIC or CSA positions on overtime and holidays because he admits that he is required to lift on such shifts. (TWA App. 3-4.)

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[7] Summerville contends that the Court of Appeals erred because the District Court found "ample" evidence at trial to support Summerville's claim that lifting was *not* an essential function of his job. Summerville's argument misses the mark, again. Only the System Board has the authority to determine what is required when there is a contractual dispute submitted to it, which Summerville in fact did. Now, having lost his grievance, Summerville would like to ignore the findings and try to convince a federal court of what the Board already rejected. As Summerville acknowledges in his Brief (Pet. Brief at 15), however, he alone chose not to appeal the System Board determination. Summerville is precluded from challenging or disregarding those findings.

The Court of Appeals, therefore, held that Summerville must be able to perform all of the functions of an EIC or CSA on overtime and holidays, due to a reduced workforce, regardless what his job on the regular shift may be. The ADA regulations recognize, as does Summerville in his Petition (Pet. Brief at 19 n. 5), that a "function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed." 29 C.F.R. § 1630.2(n)(2)(ii); *see Moritz*, 147 F.3d at 787. Accordingly, judgment as a matter of law in favor of TWA was properly granted by the Eighth Circuit because Summerville cannot perform the essential functions of his job on overtime, holiday and day-trading shifts with or without accommodation.

CONCLUSION AND PRAYER FOR RELIEF

The Eighth Circuit Court of Appeals' grant of Judgment as a matter of law in favor of TWA on Summerville's claim of disability discrimination under the ADA was proper. This is not a decision that is worthy of review by the Supreme Court. This is a fact-driven decision which, due to the unusual nature of the facts, does not have broad applicability. There is no conflict between this decision, rendered by a unanimous Eighth Circuit panel based on the law of that Circuit, and the decisions of any other circuits or a decision of this Court. *See* Sup. Ct. R. 10(a). A finding in favor of TWA in this matter is entirely consistent with longstanding Railway Labor Act precedent and with established Eighth Circuit precedent. Respondent TWA respectfully requests the Court to deny Summerville's Petition for a Writ of Certiorari.

Respectfully submitted,
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The undersigned hereby certifies that a true and correct copy of the foregoing was mailed first-class, postage prepaid this ___ day of April, 2001, to:

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

KENNETH SUMMERVILLE,
Plaintiff,

v.

TRANSWORLD AIRLINES, INC.,

Defendant.

No. 4:96CV2379-MLM

JURY TRIAL

BEFORE THE HONORABLE MARY ANN L. MEDLER
UNITED STATES MAGISTRATE

VOLUME III

OCTOBER 28, 1998

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(KEYWORD SEARCH FOR EXHIBITS AT END OF TRANSCRIPT)

you're restricted. You can't work holidays. The company said you can't work holidays and you can't work overtime; isn't that right?

A. Yes.

Q. All right. If you worked on the holiday or you worked overtime, you could be called on to do any of the functions of a CSA or a EIC, you could be called on to work the ticket counter, you could be called on to work a gate, and there could be a skeleton crew on a holiday where it's not very busy; isn't that correct?

A. Very unlikely here in St. Louis, but yes, I agree it could be I could be called on.

Q. And do you understand that that's the rationale behind the rule negotiated between your union and the company that people working overtime and holidays have to be able to perform all the functions of their job classification?

MS. DECK: Objection, Your Honor. Calls for speculation and the document speaks for itself.

THE COURT: Overruled.

THE WITNESS: Re-ask the question. I'm sorry.
BY MR. BAUER:

Q. Do you understand that that's the rationale of the provisions negotiated by your union and the company that if you are going to show up on an overtime situation or on a holiday, that you could be assigned to any job at the airport within your job classification, customer service agent or EIC, you probably won't be just going to your zone coordinator desk; do you understand that?

A. Yes.

Q. Okay.

Q. And the overtime rosters for the CSAs and the EICs, I think you've already testified to this, there is one overtime roster for all CSAs and all EICs; am I right?

A. That's correct.

Q. You talked about, I forget exactly how you characterized it, some customer service agents are not physically large and they obviously would be able to lift less than say a large person; do you remember that?

A. Yes.

Q. Would you agree the customer service agents within the perimeters of how big or how small they are, that part of their job is lifting to the best of their ability?

A. Restate your question, please.

Q. Would you agree that a customer service agent, whether large or small, is supposed to lift to the best of their ability, baggage at the ticket counter, assisting with bags at the gates, passengers, etc.?

A. I would agree that they would have to lift baggage or be able to lift baggage. In reference to wheelchairs, they can volunteer, of if they can't accommodate, then we try to find somebody else that will help out because they can't — because they are so small, they can't lift a person two hundred pounds.

Q. You know this whole volunteer thing on wheelchair passengers confuses me, and the reason it does is that in your January 1998 deposition in connection with your auto accident you testified that your job requires you to assist with wheelchair passengers. Now, which way is it?